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No. 11884

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
BEN ARNOLD,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

FILED

APR 27 1948

PAUL R. O'BRIEN,  
CLERK



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United States  
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UNITED STATES OF AMERICA,  
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United States  
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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
BEN ARNOLD,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

MR. JOHN B. TANSIL,  
United States District Attorney,  
Billings, Montana.

MR. FRANKLIN A. LAMB,  
Assistant United States District Attorney,  
Billings, Montana.

Attorneys for Plaintiff, and Appellant.

MR. ROCKWOOD BROWN,  
Billings, Montana.

MR. HORACE S. DAVIS,  
Billings, Montana.

MR. FRANKLIN S. LONGAN,  
Billings, Montana.

MR. MARION B. PORTER,  
Billings, Montana.

MR. NORMAN HANSON,  
Billings, Montana.

Attorneys for Defendant, and  
Appellee. [1\*]

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\* Page numbering appearing at foot of page of original certified  
Transcript of Record.

In the District Court of the United States in and  
for the District of Montana, Billings Division.

Civil Case No. 753.

CHESTER BOWLES, Administrator,  
Office of Price Administration,

Plaintiff,

vs.

BEN ARNOLD,

Defendant.

Be it remembered, that on January 31, 1946, a  
complaint was duly filed herein, in the words and  
figures following, to wit:

## COMPLAINT

### Count I.

1. Plaintiff as Administrator of the Office of Price Administration brings this action for treble damages on behalf of the United States Pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942, as amended, (56 Stat. 23 U. S. C. App. Sections 901-946), hereinafter called the Act.

2. Jurisdiction of the action is conferred upon this court by Section 205(c) and 205(e) of the Act.

3. From February 1, 1945 to the date of this complaint defendant sold to divers purchasers to wit; Wallin Mercantile Company, Rosebud, Montana and Safeway Store, Number 1653, Forsyth, Montana for use or consumption in the course of trade or business beef carcasses, beef wholesale



cuts and bull carcasses which had not been graded; that maximum prices have been established under the Act for such commodities; that said commodities were sold by defendant at prices higher than the maximum prices established by Revised Maximum Price Regulation No. 169 (10 F. R. 15416), the total of such overcharges amounting to \$5,119.98.

### Count II.

4. Plaintiff as Administrator of the Office of Price Administration brings this action for an injunction pursuant to the provisions of Section 205(a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sections 901-946).

5. Jurisdiction of this action is conferred upon this court by Section 205(a) and (c) of the Act.

6. Defendant, at all times material hereto has sold and sells for use or consumption in the course of trade or business beef carcasses, beef wholesale cuts and bull carcasses for which maximum prices have been established under the Act.

7. (a) Defendant failed to grade beef carcasses and wholesale cuts sold by him which are derived from steers, heifers or bulls; failed to stamp sex identification on all bull carcasses and wholesale cuts sold by him; failed to indicate on seller's invoices the sex identification of each beef carcass and wholesale cut sold by him as to stag or bull and the grade of each beef carcass and wholesale cut sold by him; failed to keep records of the sales of beef carcasses and beef wholesale cuts sold by him all as re-

quired by Revised Maximum Price Regulation No. 169 (10 F. R. 15416).

(b) Defendant sold beef carcasses, beef wholesale cuts and bull carcasses at prices in excess of the maximum prices established by Revised Maximum Price Regulation No. 169 (10 F. R. 15416).

Wherefore, plaintiff demands:

I.

Judgment in favor of the Price Administrator on behalf of the United States of America and against the defendant, for three times the amount of the total [4] overcharges, to wit, for \$15,359.94.

II.

That the defendant, his agents, servants, employees, attorneys, and all persons in active concert or participation with any of them be permanently enjoined and restrained from:

(a) Selling beef carcasses and wholesale cuts without grading the same.

(b) Failing to stamp sex identification on all bull carcasses and wholesale cuts sold by him.

(c) Failing to indicate on seller's invoices the sex identification of each of beef carcass and wholesale cut sold by him as to stag or bull and the grade of each beef carcass and wholesale cut sold by him.

(d) Failing to keep records of sales of beef carcasses and beef wholesale cuts sold by him.

(e) Selling beef carcasses, beef wholesale cuts and bull carcasses at prices in excess of the maximum prices established by Revised Maximum Price Regulation No. 169.

CLARENCE E. WOHL,  
By /s/ WESLEY W. WERTZ,  
ALEX LEVINSKI,  
Attorneys for Plaintiff,  
408 Placer Hotel Bldg.  
Helena, Montana.

Defendant's Address: Forsyth, Montana.

[Endorsed]: Filed Jan. 31, 1946. [5]

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Thereafter, on March 15, 1946, Defendant's Consolidated Motions to Dismiss, for Separate Statement of Claims, for Definite Statement, etc., was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

DEFENDANT'S CONSOLIDATED MOTIONS  
TO DISMISS, FOR SEPARATE STATE-  
MENT OF CLAIMS. FOR DEFINITE  
STATEMENT, ETC.

The defendant separately moves the court as follows:

I.

Separately and without waiver of any other motion herein made the defendant respectfully moves the court to dismiss the first count of the

plaintiff's complaint, and his action there for the reason that Count I of the complaint herein fails to state a claim upon which relief can be granted.

## II.

Separately and without waiver of any other motion herein made the defendant respectfully moves the court to dismiss the second count of the plaintiff's complaint, and his action there for the reason that Count II of the complaint herein fails to state a claim upon which relief can be granted.

## III.

Separately and without waiver of any other motion herein made the defendant respectfully moves the court to direct the plaintiff to file a more definite statement or a bill of particulars of the following matters, to which the complaint herein refers:

1. The date or dates of the sales in paragraph 3 of Count I of the complaint averred (a) to Wallin Mercantile Company, Rosebud, Montana, and (b) to Safeway Store, Number 1653, Forsyth, Montana.

2. The quantity, the unit price or the price per pound, the name of the customer, and a description of the part, cut or portion of the beef carcasses, beef wholesale cuts and bull carcasses, in each case, sold as charged in paragraph 3 of Count I of the complaint.

3. The total price charged by the defendant in the case of each sale as alleged in paragraph 3 of Count I of the complaint.

4. The ceiling price established and applicable, as the plaintiff contends, in the case of each to which paragraph 3 of Count I of the complaint refers.

5. Any amendment or amendments of Revised Maximum Price Regulation No. 169 (10 Fed. Reg. 15416) in effect, as the plaintiff claims, upon which the overcharges by him specified in Count I of his complaint are predicated.

6. The separate and specific overcharges to which the plaintiff refers in paragraph 3 of Count I of his complaint amounting in the aggregate, as he there alleges, to \$5,119.98. [8]

7. The date or dates and the place or places of the violations specified in paragraph 7(a) of Count II of the complaint, and the general nature of each transaction to which reference is there made, and upon which under Count II of the complaint aforesaid the defendant is charged.

8. The date or dates and the place or places of the sales made by the defendant as alleged in excess of established maximum prices and as in paragraph 7(b) of Count II of the complaint charged, together with the name of the customer or customers in each case, the commodity sold, the ceiling price and the price charged, all if in any case other sales are here assigned than those to which paragraph 3 of Count I of the complaint refers.

The ground of this motion is that the matters specified above are not averred with sufficient definiteness or particularly in the complaint to en-

able the defendant properly to prepare his answer forasmuch as he cannot from the face of the complaint determine sales to which reference is there made or identify the transactions upon which reliance is there had in either count, and that in consequence the defendant cannot now with certainty either admit or deny the overcharges there alleged and the violations there specified.

This motion is made and based upon the plaintiff's complaint herein, and upon each count thereof.

Dated at Billings, Montana, this 14th day of March, 1946.

ROCKWOOD BROWN,  
Attorney for Defendant.

ROCKWOOD BROWN &  
HORACE S. DAVIS,  
FRANKLIN S. LONGAN,  
By ROCKWOOD BROWN,  
Attorneys for Defendant.

Suite 4,  
The Montana National  
Bank Bldg.,  
Billings, Montana.

The defendant, Ben Arnold, in the within action here designates Suite 4, the Montana National Bank Building, Billings, Montana, and the offices at that address of his attorneys herein, Rockwood Brown & Horace S. Davis and Franklin S. Longan, as the place within the district of Montana where service in this action may be made upon him of all subsequent papers, except writs and process, and



further consents to such service in this action to be made upon him as aforesaid.

ROCKWOOD BROWN,

Attorney for Defendant.

ROCKWOOD BROWN &

HORACE S. DAVIS,

FRANKLIN S. LONGAN,

By ROCKWOOD BROWN,

Attorneys for Defendant.

[Affidavit of mailing attached.]

[Endorsed]: Filed March 15, 1946. [11]

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Thereafter, on July 6, 1946, an Order Granting Motion for Substitution of Paul A. Porter for Chester Bowles as party plaintiff, was duly entered herein, as follows, to wit:

[Title of District Court and Cause.]

ORDER GRANTING MOTION FOR SUBSTITUTION OF PAUL A. PORTER FOR CHESTER A. BOWLES

For good cause appearing, it is ordered that plaintiff's motion for substitution of Paul A. Porter for Chester Bowles, as Administrator Office of Price Administration, be and is granted; and the defendant is granted ten days from receipt of notice hereof, within which to reform or modify his pending consolidated motions.

Entered in open Court at Billings, Montana, July 6, 1946. [13]

H. H. WALKER,  
Clerk.

Thereafter, on July 17, 1946, Defendant's Amended Consolidated Motions to Dismiss, for Separate Statement of Claims, for Definite Statement, etc., was duly filed herein, in the words and figures following to wit:

In the District Court of the United States for  
the District of Montana, Billings Division

Civil Action No. 753

PAUL A. PORTER, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

BEN ARNOLD,

Defendant.

DEFENDANT'S AMENDED CONSOLIDATED  
MOTIONS TO DISMISS, FOR SEPARATE  
STATEMENT OF CLAIMS, FOR DEFINITE  
STATEMENT, ETC.

The defendant separately moves the court as follows:

I.

To dismiss the first count of the plaintiff's complaint, and his action there for the reason that Count I of the complaint herein fails to state a claim upon which relief can be granted.

II.

To dismiss the second count of the plaintiff's complaint, and his action there for the reason that Count II of the complaint herein fails to state a claim upon which relief can be granted.



## III.

To dismiss the action herein, because the Emergency Price Control Act of 1942, sometimes Title 50, Sections 901-946, United States Code, under which the action herein is brought, expired with June 30, 1946.

## IV.

To dismiss the action herein, because Revised Maximum Price Regulation 169 (10 F. R. 15416) heretofore promulgated under the Emergency Price Control Act of 1942 expired for all purposes with June 30, 1946, and is no longer in force or effect.

## V.

To dismiss the first count of the action herein, because for the purposes of this count the Emergency Price Control Act of 1942, as amended, sometimes Title 50, Sections 901-946, United States Code, and Revised Maximum Price Regulation 169 (10 F. R. 15416) promulgated thereunder expired for all the purposes of this count with June 30, 1946.

## VI.

To dismiss the second count of the action herein, because for the purposes of this count the Emergency Price Control Act of 1942, as amended, sometimes Title 50, Sections 901-946, United States Code, and Revised Maximum Price Regulation 169 (10 F. R. 15416) promulgated thereunder expired for all the purposes of this count with June 30, 1946.

## VII.

To dismiss the action herein, because the plaintiff is now without capacity to sue.

## VIII.

To dismiss the first count of the action herein, because the plaintiff is now without capacity to sue for recovery on this count.

## IX.

To dismiss the second count of the action herein, because the plaintiff is now without capacity to sue for the recovery on this count.

## X.

To dismiss the action herein, because the office of the plaintiff as price administrator under the Emergency Price Control Act of 1942, as amended, terminated in the premises with the expiration of the said act on June 30, 1946.

## XI.

To dismiss the action herein, because the plaintiff is not now the administrator of the office of Price Administration, and is accordingly without authority in law to bring or maintain this action.

Or in the alternative:

## XII.

To direct the plaintiff to file a more definite statement or a bill of particulars of the following matters, to which the complaint herein refers:

1. The date or dates of the sales in paragraph 3 of Count I of the complaint averred (a) to Wallin Mercantile Company, Rosebud, Montana, and (b) to Safeway Store, Number 1653, Forsyth, Montana.

2. The quantity, the unit price or the price per pound, the name of the customer, and a description of the part, cut or portion of the beef carcasses, beef wholesale cuts and bull carcasses, each case, sold as charged in paragraph 3 of Count I of the complaint. [17]

3. The total price charged by the defendant in the case of each sale as alleged in paragraph 3 of Count I of the complaint.

4. The ceiling price established and applicable, as the plaintiff contends, in the case of each sale to which paragraph 3 of Count I of the complaint refers.

5. Any amendments or amendment of Revised Maximum Price Regulation No. 169 (10 Fed. Reg. 15416) in effect, as the plaintiff claims, upon which the overcharges by him specified in Count I of his complaints are predicated.

6. The separate and specific overcharges to which the plaintiff refers in paragraph 3 of Count I of his complaint amounting in the aggregate, as he there alleges, to \$5,119.98.

7. The particular computations by which the plaintiff fixes the maximum ceiling prices applicable to the sales upon which the charges of violation in counts one and two are based, including specifically the basic maximum price or prices used, the freight differential, and any additional packing and local delivery charges.

8. The date or dates and the place or places of the violation specified in paragraph 7(a) of Count II of the complaint, and the general nature of each transaction to which reference is there made, and upon which under Count II of the complaint aforesaid the defendant is charged.

9. The date or dates and the place or places [18] of the sales made by the defendant as alleged in excess of established maximum prices and as in paragraph 7(b) of Count II of the complaint charged, together with the name of the customer or customers in each case, the commodity sold, the ceiling price and the price charged, all if in any case other sales are here assigned than those to which paragraph 3 of Count I of the complaint refers.

The ground of this motion is that the matters specified above are not averred with sufficient definiteness or particularity in the complaint to enable the defendant properly to prepare his answer forasmuch as he cannot from the face of the complaint determine the sales to which reference is there made or identify the transaction upon which reliance is there had in either count, or compute the alleged overcharges as averred, or determine the plaintiff's computations in connection therewith in making his allegation of violation by the defendant, and that in consequence the defendant cannot now with certainty either admit or deny the overcharges there alleged and the violations there specified.

This motion is made and based upon the plaintiff's complaint herein, and upon each count thereof.

Dated at Billings, Montana, this 16th day of July, 1946.

HORACE S. DAVIS,  
Attorney for Defendant.

ROCKWOOD BROWN &  
HORACE S. DAVIS,  
FRANKLIN S. LONGAN,  
By HORACE S. DAVIS,  
Attorneys for Defendant.

Suite 4,  
The Montana National  
Bank Bldg.,  
Billings, Montana.

[Affidavit of mailing attached.]

[Endorsed]: Filed July 17, 1946. [20]

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Thereafter, on July 27, 1947, Motion for Substitution of Party Plaintiff was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF  
PARTY PLAINTIFF

The petition of the United States Attorney respectfully shows:

1. That by Executive Order Number 9842 all OPA treble damage actions were transferred from the Office of Temporary Controls to the

Department of Justice, and by said order the Attorney General was ordered to coordinate, conduct, initiate, maintain or defend all OPA civil litigation from and after June 1, 1947, in the name of the United States, or otherwise as permitted by law.

2. By said Executive Order Philip B. Fleming ceased to hold office as Price Administrator, Office of Temporary Controls, and there is a need for a substitution of party plaintiff.
3. That there is a substantial need for continuing and maintaining this action.

Wherefore, petitioner prays that the United States of America be substituted as plaintiff herein in the place and stead of Paul A. Porter, Administrator, Office of Price Administration, who was succeeded by Philip B. Fleming as Administrator, Office of Temporary Controls.

JOHN B. TANSIL,

Attorney of the United States, in and for the  
District of Montana.

FRANKLIN A. LAMB,

Assistant Attorney of the United States, in and for  
the District of Montana.

[Endorsed]: Filed June 27, 1947. [23]



Thereafter, on June 27, 1947, Affidavit in Support of Plaintiff's Motion for Substitution of Party Plaintiff was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

### AFFIDAVIT

State of Montana,  
County of Yellowstone—ss.

Franklin A. Lamb, being first duly sworn deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled action; that on May 6, 1947, the office of the United States Attorney in and for the District of Montana received a copy of Executive Order Number 9842, in words and figures as follows:

#### Executive Order No. 9842

#### Conduct of Certain Litigation arising Under Wartime Legislation

By virtue of the authority vested in me by the Constitution and statutes, including Title 1 of the First War Powers Act, 1941, and as President of the United States, and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under the statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government as follows:

1. The Attorney General is authorized and directed, in the name of the United States or other-

wise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

- (a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;
- (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;
- (c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies because of non-compliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946, any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

/s/ HARRY S. TRUMAN

The White House

April 23, 1947

(12 Fed. Reg. 2646 - April 25, 1947)



That the cause of action forming the basis of the complaint herein is one to recover damages "on behalf of the United States," (Section 205(e) of the Emergency Price Control Act of 1942, as amended). This action is in no sense personal to the Administrator as he was merely authorized to bring the action "on behalf of the United States" into whose treasury will go the proceeds of any judgment collected as a result of this action.

That the fact that Paul A. Porter was replaced as the Administrator of the Office of Price Administration, and that the action has been transferred to the Department of Justice for completion has no effect upon the merits of said cause. That the Executive Order referred to and quoted above demonstrates the necessity and intention to continue all pending cases under the Emergency Price Control Act of 1942, as amended.

FRANKLIN A. LAMB,  
Assistant Attorney of the United States, in and for  
the District of Montana.

Subscribed and sworn to before me this 26th day  
of June, 1947.

[Seal] DALE F. GALLES,  
Notary Public for the State of Montana Residing  
at Billings, Montana.

My commission expires 4-15-49.

[Endorsed]: Filed June 27, 1947. [27]

Thereafter, on July 10, 1947, Defendant's Objections to Motion for Substitution of Party Plaintiff was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

### OBJECTIONS TO MOTION FOR SUBSTITUTION OF PARTY PLAINTIFF

The defendant respectfully objects to the motion or petition herein for the substitution of the United States of America as party plaintiff in this action, and thereunto respectfully shows to the Court as follows, to wit:

1. The action herein has abated and may not now be revived or continued, because

(a) On July 6, 1946, by the order of this Court that day entered Paul A. Porter, Administrator, Office of Price Administration, was substituted as party plaintiff for Chester Bowles, Administrator, etc.

(b) On December 12, 1946, Paul A. Porter, Administrator, etc. ceased to hold the Office of Price Administrator, Office of Price Administration, and resigned his office as an officer of the United States.

(c) On December 12, 1946, by Executive Order No. 9809 (11 F. R. 14218) of the President of the United States one Philip B. Fleming, the Administrator, Office of Temporary

Controls, was invested with all the functions of the Price Administrator, Office of Price Administration, with full power and authority to continue and maintain in his name all civil proceedings theretofore instituted by the Price Administrator.

(d) On February 3, 1947, Philip B. Fleming, Administrator, etc. filed his motion in this Court and action for substitution as party plaintiff herein. This motion was never acted upon, and [29] Mr. Fleming was never substituted as party plaintiff in this action.

(e) On June 1, 1947, the said Philip B. Fleming, Administrator, etc. ceased to hold office, and the Office of Price Administration and of the Administrator thereof was abolished by the Executive Order No. 9842 (12 F. R. 2646) of the President of the United States.

(f) On June 12, 1946, the full period of six months after Mr. Fleming took office as the successor to Mr. Porter, Administrator, etc. as aforesaid, fully expired.

(g) On June 26, 1947, or shortly thereafter, and after the full period of six months aforesaid had expired the motion herein for the substitution of the United States of America as party plaintiff was first served and filed.

2. Accordingly, the action here may not be further continued or maintained in the name of the United

States of America or otherwise within the intent and meaning of Rule 25(d), Federal Rules of Civil Procedure for want of any satisfactory showing to the Court on or before June 12, 1947, that there was a substantial need for so continuing and maintaining it.

3. Accordingly, the action here may not be further continued or maintained in the name of the United States of America or otherwise within the intent and meaning of Section 780, Title 28, United States Code, otherwise Section 11, chap. 229, Act of February 13, 1925; 43 Stat. 941, for want of any satisfactory showing to the Court on or before June 12, 1947, that there was a substantial need for so continuing and maintaining the cause.

4. There is no substantial or any need for continuing or further maintaining this action.

HORACE S. DAVIS,

Attorney for Defendant.

ROCKWOOD BROWN &

HORACE S. DAVIS,

MARION B. PORTER and

NORMAN HANSON,

By HORACE S. DAVIS,

Attorneys for Defendant,

Suite 4,

The Montana National

Bank Bldg.,

Billings, Montana.

Personal service of the within and foregoing Objections to Motion for Substitution of Party Plaintiff made and admitted, and the receipt of a true copy thereof acknowledged, this 9th day of July, 1947.

JOHN B. TANSIL,  
Attorney for the United States in and for the  
District of Montana.

By FRANKLIN A. LAMB,  
Assistant Attorney for the United States in and  
for the District of Montana.

[Endorsed]: Filed July 10, 1947.

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Thereafter, on July 10, 1947, Defendant's Motion to Abate and Dismiss was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

### MOTION TO ABATE AND DISMISS

The defendant respectfully moves the Court to dismiss and abate the action herein, and thereunto respectfully shows the following grounds, to wit:

1. The action herein abated on December 12, 1946, upon the resignation of the plaintiff, Paul A. Porter, Administrator, Office of Price Administration, who that day ceased to hold his office as such; and thereupon the same day, viz., on December 12, 1946, his successor, one Philip B. Fleming, the Administrator, Office of Temporary Controls, took office as Administrator, Office of Price Administration.

2. But no showing to this Court whether satisfactory or otherwise that there is a substantial need for continuing and maintaining this action by the said Philip B. Fleming, Administrator, etc., and successor in office as aforesaid, has been made or offered, and no motion thereunto has been presented, and no substitution of parties plaintiff had within six months after the said Philip B. Fleming, successor etc., took office, all of which appears with greater certainty from these facts, viz..

(a) On July 6, 1946, by the order of this Court that day entered Paul A. Porter, Administrator, Office of Price Administration, was substituted as party plaintiff for Chester Bowles, Administrator, etc.

(b) On December 12, 1946, Paul A. Porter, Administrator, etc. ceased to hold the Office of Price Administrator, Office of Price Administration, and resigned his office as an officer of the United States.

(c) On December 12, 1946, by Executive Order No. 9809 (11 F. R. 14218) of the President of the United States one Philip B. Fleming, the Administrator, Office of Temporary Controls, was invested with all the functions of the Price Administrator, Office of Price Administration, with full power and authority to continue and maintain in his name all civil proceedings theretofore instituted by the Price Administrator.



(d) On February 3, 1947, Philip B. Fleming, Administrator, etc. filed his motion in this Court and action for substitution as party plaintiff herein. This motion was never acted upon, and Mr. Fleming was never substituted as party plaintiff in this action.

(e) On June 1, 1947, the said Philip B. Fleming, Administrator, etc. ceased to hold office, and the Office of Price Administration and of the Administrator thereof was abolished by the Executive Order No. 9842 (12 F. R. 2646) of the President of the United States.

(f) On June 12, 1946, the full period of six months after Mr. Fleming took office as the successor to Mr. Porter, Administrator, etc. as aforesaid, fully expired.

3. Accordingly, the action here may not be in any case revived and further continued or maintained for failure to comply with Rule 25(d), Federal Rules of Civil Procedure.

4. Accordingly, the action here may not be in any case revived and further continued or maintained for failure to comply with Section 780, Title 28, United States Code, otherwise Section 11, chap. 229, Act of February 13, 1925; 43 Stat. 941. [34]

5. Accordingly, the action here may not be revived and further continued or maintained for want of any person at this date the successor in office of the said Paul A. Porter, Administrator, etc., plaintiff herein, to be substituted in any case now as party plaintiff in this action and within the

intent and meanng of Rule 25(d), Federal Rules of Civil Procedure and Section 780, Title 28, United States Code, each aforesaid.

This motion is made and based upon the complaint in this action and upon all the papers, files, proceedings and minute entries therein, and upon the whole record in the cause heretofore had and made.

HORACE S. DAVIS,  
Attorney for Defendant.  
ROCKWOOD BROWN &  
HORACE S. DAVIS,  
MARION B. PORTER and  
NORMAN HANSON,  
By HORACE S. DAVIS,  
Attorneys for Defendants,  
Suite 4,  
The Montana National  
Bank Bldg.,  
Billings, Montana.

Personal service of the within and foregoing Motion to Abate and Dismiss made and admitted, and the receipt of a true copy thereof acknowledged, this 9th day of July, 1947.

JOHN B. TANSIL,  
Attorney for the United States in and for the  
District of Montana.

By FRANKLIN A. LAMB,  
Assistant Attorney for the United States in and  
for the District of Montana.

[Endorsed]: Filed July 10, 1947. [35]



Thereafter, on November 25, 1947, Decision and Order Granting Motion to Abate and Dismiss, was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana, Billings Division

Civil Action No. 753

PAUL A. PORTER, Administrator,  
Office of Price Administration,

Plaintiff,

vs.

BEN ARNOLD,

Defendant.

## DECISION AND ORDER GRANTING MOTION TO ABATE AND DISMISS

Herein the plaintiff moves for substitution of party plaintiff; the defendant opposes the same and moves to abate dismiss the action. Under certain circumstances an action abates and should be dismissed, and this appears to be such an action.

Chester Bowles, then administrator of O. P. A. brought an action against the defendant for treble damages under the Emergency Control Act of 1942; this action was commenced January 31st, 1946; thereafter Mr. Bowles resigned, as such administrator, and on July 6th, 1946, Paul A. Porter was substituted as party plaintiff. On December 12, 1946, Mr. Porter resigned, and on that date Philip B. Fleming became his successor, but has never been substituted as party plaintiff herein, and the

six month period, after Mr. Fleming took office expired on June 12th, 1947, without any substitution of a party plaintiff having been made.

Counsel for the Government, on or about June 26th, 1947, filed a motion to substitute the United States as party plaintiff in this action, which was submitted for decision under Rule 40 (2) of said court.

Counsel for defendant claims that this action may not now be maintained, but must be dismissed, because more than six months have elapsed after Mr. Porter ceased to hold office [37] as administrator of O.P.A. without substitution of his successor, and cites as authority for his contention Sec. 780, Title 28, U. S. C. A., and Rule 25 (d), Federal Rules of Civil Procedure; also *Fix. v. Philadelphia Barge Co.*, 290 U. S. 530.

Many authorities have been cited by counsel for the respective parties which the court has considered. Counsel for defendant especially emphasizes the point that the pending action should be distinguished from the cause or right of action, and good authority is referred to as a basis for his contention. The court has noted the arguments of counsel on the question of time and applicability of the statute and rule cited.

The Government counsel filed motion for substitution of party plaintiff, presumably under Sec. 780, Title 28, U. S. C. A. and Rule 25 (d), and in the court's opinion are governed by both the statute and rule, and while there is a slight variance in the language of the statute with the rule, the

result would be the same under the facts shown to exist in this case. Mr. Porter resigned December 12, 1946, and on that date Mr. Fleming became his successor, but the latter was never substituted as plaintiff in this action, nor was any application ever made to the court for the substitution of a party plaintiff to succeed Mr. Porter until more than six months after his successor took office.

After a consideration of the briefs of counsel and the authorities relied upon, the court believes that the motion to abate the action and dismiss the case without prejudice should be granted, and such is the order herein, with exception allowed counsel for the United States.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed Nov. 25, 1947. [38]

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Thereafter, on November 28, 1947, an Order Dismissing Plaintiff's Complaint and Action, was duly filed and entered, being as follows, to wit: [39]

[Title of District Court and Cause.]

### ORDER

The defendant's motion to abate and dismiss the action herein having been previously argued by counsel upon written briefs; and the motion of the defendant having been by the court heretofore, to wit, on November 25, 1947, granted; and good cause therefore being made to appear,

Now, Therefore, the complaint of the plaintiff and the action here are, and they are each and both, hereby dismissed.

Done and dated this 28th day of Nov., 1947.

By the Court:

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed, entered and noted in Civil Docket Nov. 28, 1947. [40]

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Thereafter, on February 21, 1948, a Notice of Appeal to the Circuit Court of Appeals was duly filed herein, in the words and figures following, to wit: [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice Is Hereby Given that United States of America hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying motion to substitute United States of America as plaintiff and granting defendant's motion to dismiss entered in this action on November 25, 1947.

JOHN B. TANSIL,  
Attorney of the United States, in and for the District of Montana.

FRANKLIN A. LAMB,  
Assistant Attorney of the United States, in and for the District of Montana.

[Endorsed]: Filed Feb. 21, 1947. [42]

Thereafter, on March 9, 1948, Plaintiff's Designation of Contents of Record on Appeal was duly filed herein, in the words and figures following, to wit [43]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Comes Now the plaintiff, and designates the portions of the record in the United States District Court to be contained in the record on appeal as follows:

The complaint on file herein; the defendant's consolidated Motion to Dismiss filed March 15, 1946; the Order granting Motion to Substitute Paul A. Porter for Chester Bowles, filed July 6, 1946; defendant's amended consolidated Motions to Dismiss filed July 17, 1946; plaintiff's Motion for Substitution of Party Plaintiff filed June 27, 1947; Affidavit in support of plaintiff's Motion filed June 27, 1947; defendant's objections to Motion for Substitution of Party Plaintiff filed July 10, 1947; defendant's Motion to Abate and Dismiss filed July 10, 1947; Decision and Order granting Motion to Abate and Dismiss filed November 25, 1947; Order dismissing plaintiff's complaint and the above-entitled action filed November 28, 1947; the Notice of Appeal; this

Designation; plaintiff's and appellant's Statement of Points.

JOHN B. TANSIL,  
United States Attorney in and for the District of  
Montana.

FRANKLIN A. LAMB,  
Assistant United States Attorney in and for the  
District of Montana.

[Endorsed]: Filed March 8, 1948. [44]

Service of the foregoing Designation admitted,  
and receipt of a copy thereof acknowledged this 6th  
day of March, 1948.

ROCKWOOD BROWN &  
HORACE S. DAVIS,  
MARION B. PORTER &  
NORMAN HANSON,  
By /s/ HORACE S. DAVIS,  
Attorneys for Defendant. [45]

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Thereafter, on March 9, 1948, a Stipulation as to  
the Record was duly filed herein, in the words and  
figures following, to wit: [46]

#### STIPULATION AS TO THE RECORD

It Is Hereby Stipulated and Agreed that the record on appeal shall consist of the papers and documents referred to in the Designation of the plaintiff and appellant filed herein.



Dated this 6th day of March, 1948.

JOHN B. TANSIL,  
United States Attorney in and for the District of  
Montana,

/s/ FRANKLIN A. LAMB,  
Assistant United States Attorney in and for the  
District of Montana,

Attorneys for Plaintiff  
and Appellant.

ROCKWOOD BROWN &  
HORACE S. DAVIS,  
MARION B. PORTER &  
NORMAN HANSON,  
By /s/ HORACE S. DAVIS,  
Attorneys for Defendant.

[Endorsed]: Filed March 9, 1948. [47]

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Thereafter, on March 9, 1948, Statement of  
Points of Appellant was duly filed herein, in the  
words and figures following, to wit: [48]

[Title of District Court and Cause.]

#### STATEMENT OF POINTS OF APPELLANT

Comes Now the plaintiff and appellant and makes  
the following statement of points upon which it in-  
tends to rely on the appeal:

1. The defendant's Motion to Abate and Dismiss  
upon the ground that the same fails to state  
a legal reason upon which the action might be  
abated or dismissed.

2. The objections to plaintiff's and appellant's Motion for Substitution of Party Plaintiff upon the ground that it fails to state a legal reason why said motion should not be granted.
3. The Court erred in its decision dated November 25, 1947, granting defendant's Motion to Abate the action and dismiss the case, since it appears that neither Section 780, Title 28, U.S.C.A., nor Rule 25(b), Federal Rules of Civil Procedure were properly interpreted and applied by the Court in its decision.
4. The Court erred in its Order dated November 28, 1947, dismissing plaintiff's complaint and the above-entitled action, as the same was not properly based in law.

JOHN B. TANSIL,

United States Attorney in and for the District of Montana,

/s/ FRANKLIN A. LAMB,

Assistant United States Attorney in and for the District of Montana,

Attorneys for Plaintiff  
and Appellant. [49]

Service of the Foregoing Statement of Points admitted, and receipt of a copy thereof acknowledged this 6th day of March, 1948.

ROCKWOOD BROWN &  
HORACE S. DAVIS,  
MARION B. PORTER &  
NORMAN HANSON,

By HORACE S. DAVIS,

Attorneys for Defendant.

[Endorsed]: Filed March 9, 1948. [50]



In the District Court of the United States in and  
for the District of Montana

United States of America,  
District of Montana—ss.

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 51 pages, numbered consecutively from 1 to 51 inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 753, Chester Bowles, Administrator, Office of Price Administration, versus Ben Arnold, designated by the parties as the record on appeal thereon, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Seventeen and no/100 Dollars (\$17.00), and have been made a charge against the United States of America, appellant.

Witness my hand and the seal of said Court at Great Falls, Montana, this 10th day of March, A. D. 1948.

[Seal]                      H. H. WALKER,  
Clerk, United States District Court, for the District  
of Montana.

By /s/ C. G. KEGEL,  
Deputy Clerk. [51]

[Endorsed]: No. 11884. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Ben Arnold, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed March 15, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.